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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI AND
RAY MARSHALL, *Secretary of Labor, Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR RESPONDENT EDWARD SADLOWSKI IN OPPOSITION

JOHN W. DOUGLAS
C. MICHAEL BUXTON
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent Edward Sadlowski

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

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Respondent Edward Sadlowski submits this Brief in opposition to the petition of the United Steelworkers of America for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued on April 20, 1977.

QUESTION PRESENTED

Whether this Court should grant *certiorari* to review the decision of the Court of Appeals that Title

IV of the LMRDA does not preclude an award of attorneys' fees to a union member who successfully intervenes in the Secretary of Labor's action against the union, and through his efforts to correct union election irregularities contributes a common benefit to the members of the union, where

> (1) the decision is in accord with the decisions of this Court,
>
> (2) the decision is consistent with the decisions of other courts of appeals which have considered the question, and
>
> (3) the decision remands the case to the District Court for determination of the amount of the attorneys' fees.

COUNTER-STATEMENT OF THE CASE

Respondent relies upon the full statement of facts contained in the opinion of the Court of Appeals (Petn. App. A, at 2a-5a, 13a-21a). The basic facts are as follows:

Respondent lost an election for the directorship of District 31 of the petitioner the United Steelworkers. District 31 is the largest district in the union. Contending that widespread irregularities had occurred in that election, respondent, pursuant to Title IV of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 482, brought a complaint before the petitioner union. When the union refused to act on respondent's complaint, respondent complained to the Secretary of Labor.

Some time thereafter and pursuant to the statute, the Secretary of Labor brought an action in the U.S.

District Court for the Western District of Pennsylvania against the petitioner union to overturn the election on the grounds of certain irregularities in the conduct of the election. Respondent intervened in that action, as permitted by *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), and participated in discovery and development of the case. Thereafter, an agreement was reached whereby petitioner agreed to hold a new election to be supervised by the Secretary and the District Court. Respondent and his attorneys assisted in the formulation of procedures to govern the new election and assisted in monitoring it. Respondent won the new election with a margin of almost two-to-one. The District Court then ruled, as a matter of law, that respondent was not entitled to attorneys' fees. The Court of Appeals for the Third Circuit reversed that ruling and ordered the District Court to determine the appropriate fees.[1]

REASONS FOR DENYING THE WRIT

This case presents no issues worthy of consideration by this Court upon *certiorari.* The decision of the Court of Appeals is merely a straightforward application of previous decisions of this Court, with limited practical significance beyond the discrete facts of this Title IV case. Moreover, the decision is squarely in point with a decision of the D.C. Circuit, in which this

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[1] The appropriate fees have yet to be determined. Petitioner's estimate (Petn. 6) that the fees might approach $500,000 is without foundation. Respondent's Verified Application for Attorney's Fees, filed in the District Court, listed 1785 total hours of work by his attorneys. Much of that work was performed by a young attorney recently out of law school. Thus, clearly the fee would not approach the amount suggested by petitioner.

Court recently denied *certiorari*. *Usery* v. *Local Union No. 639, Internatl. Broth. of Teamsters, Etc.*, 177 U.S. App. D.C. 222, 543 F.2d 369 (1976), *cert. denied sub nom. Local Union No. 639* v. *Marshall*, 429 U.S. 1123 (1977). No federal appellate court decision conflicts with the instant one. Finally, no attorneys' fees have yet been awarded. The Third Circuit has simply ruled that fees are permissible here, and left the question of the proper amount to the District Court. Review by this Court in such circumstances would be wholly premature and unwarranted.

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT

A. There Has Been No Statutory Preclusion of Attorneys' Fees

Petitioner argues that Title IV of the LMRDA should be read to preclude an award of attorneys' fees to successful intervenors such as respondent. Petitioner also argues that the Court of Appeals' ruling to the contrary is inconsistent with the decisions of this Court in four cases—*Trbovich, Hall, Mills,* and *Fleischmann.*[2]

The post-election remedial scheme of Title IV, described in detail in the opinion below (App. A, at 10a-21a), is dependent on the diligent efforts of a union member such as respondent.[3] The union member

[2] Trbovich v. United Mine Workers, 404 U.S. 528 (1972); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[3] This Court has frequently emphasized the important role of the union member in the Title IV post-election enforcement mechanism. *E.g.*, Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463 (1968); Wirtz v. Local 125, Laborers' Internatl. Union,

must ferret out the election irregularity, bring it to the attention of the union, and if relief is not forthcoming, formally complain to the Secretary of Labor. The Secretary's ability to institute a federal court action under Title IV is absolutely dependent on such action by the union member.

In *Trbovich,* this Court held that union members may intervene, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, in Title IV post-election suits brought by the Secretary. *Trbovich* specifically rejected the argument (renewed by petitioner here) that the Secretary's "exclusive" power to institute an election challenge under Title IV forbade intervention and participation by interested union members. The Court held that Congress did not intend to preclude private participation in the Title IV enforcement litigation, where union members "assist" the Secretary in the prosecution of such action.[4] The *Trbovich* ruling was extended in *Dunlop* v. *Bachowski,* 421 U.S. 560 (1975), where this Court held that a federal court even has jurisdiction to entertain an action by a union member challenging the refusal and failure of the Secretary of Labor to institute, after investigation, a Title IV action challenging a union election.

This Court's decisions in *Hall* and in *Mills* held that the absence of specific statutory authorization for attorneys' fees did not preclude such an award. Indeed, *Hall* specifically addressed the propriety of an award

389 U.S. 477 (1968); Hodgson v. Local 6799, United Steelworkers of America, 403 U.S. 333 (1971).

[4] *Trbovich* specifically recognized that the union member intervenor could play a valuable role in "assisting the court in fashioning a suitable remedial order." 404 U.S. at 537 n.8.

of fees under the LMRDA, in a suit by a union member under Title I, challenging efforts by his union to curb his exercise of free speech rights. The Court believed that to deny an award of fees "would be tantamount to repealing [the LMRDA] by frustrating its basic purpose." *Hall* v. *Cole,* 412 U.S. 1, 13 (1973).

> " 'It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden . . . [w]ithout counsel fees. . . .' " *Ibid.*

Despite this Court's broad recognition of the important role of union members in enforcing the LMRDA, petitioner argues that the decision below is inconsistent with *Fleischmann.* There, the Court was concerned with a claim to attorneys' fees under the Lanham Act (15 U.S.C. §§ 1051-1127), in a suit by one corporation against another for trademark infringement. The Court held (1) that the meticulously detailed remedies of the Lanham Act evidenced a specific congressional intent to preclude an award of fees, *and* (2) that no basis existed for an award of fees under the equitable powers of federal courts.

In *Hall,* however, this Court rejected *Fleischmann's* applicability to Title I of the LMRDA. Moreover, two federal courts of appeals have now rejected *Fleischmann's* applicability to preclude fees in cases under Title IV.[5] The D.C. Circuit in the *Local 639* case,

[5] *See also* Yablonski v. United Mine Workers, 151 U.S. App. D.C. 253, 258, 466 F.2d 424, 429 (1972), *cert. denied,* 412 U.S. 918 (1973).

supra, 177 U.S. App. D.C. at 239-41, 543 F.2d at 386-88, and the Third Circuit in the instant case (App. A, at 6a-10a) both recognized that Title IV requires that federal courts fill out the details of the statutory scheme. For example, despite the absence of a provision for settlements in the statute, many cases, such as the instant one, have been settled short of actual trial, and this Court has stressed the ameliorative function of the Secretary in encouraging settlements.[6] Other courts have read a "waiver" procedure into the statute with respect to the 60-day limitations period of Section 402 to afford time to negotiate settlements,[7] and thereafter approved the resulting disposition as in conformity with Title IV. In addition, at the remedial stage, courts have defined the timing, scope, and procedures of the new supervised election, and have entered orders embodying a broad range of ancillary relief to insure the integrity of the contest. *See Usery* v. *Local 639, supra,* 177 U.S. App. D.C. at 241, 543 F.2d at 388.

It is, therefore, evident that the Third Circuit here has simply applied the decisions of this Court, and followed other appellate courts which have examined this attorneys' fees question. The decision below represents no more than an application of the principles of those cases and raises no issue worthy of review here. Moreover, the case is of limited practical significance because it applies only in the limited circumstances of a Title IV action where a union member intervenes.

Petitioner strives to extend the practical significance of the case, offering a parade of hypothetical horribles

[6] *See* Calhoon v. Harvey, 379 U.S. 134, 140-41 (1964).

[7] *See* Hodgson v. Machinists Lodge 851, 454 F.2d 545 (7th Cir. 1971).

(Petn. 24-28) against permitting an award of fees in Title IV post-election cases. Basically, petitioner argues that potential fee awards will "burden" the union with undue litigation. The point is without merit.

Petitioner argues that *Trbovich* prevents Title IV intervenors from participating in any manner that would burden the union. But *Trbovich* recognized that Title IV sought only to prevent the union from being forced to litigate alleged election irregularities in multiple suits and forums. *Trbovich* v. *United Mine Workers, supra,* 404 U.S. at 532. *Trbovich* saw no burden in permitting a union member to participate, as intervenor, in the litigation brought by the Secretary. Indeed, this Court recognized in *Hall* that the possibility that fees will somehow burden the union is "relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Hall* v. *Cole, supra,* 412 U.S. at 9 n.13 (emphasis original).

Petitioner's strained claim of extended litigation needed to determine the fee award in this case is most appropriately addressed to the District Court upon remand, and certainly does not make this case worthy of review here. In any event, litigation over the appropriate fee in the District Court will only be complicated if petitioner so chooses. As noted by the Third Circuit (App. A, at 37a-40a), the District Court simply needs to determine the time spent by respondent's counsel, their contribution to the litigation and to the union membership and the appropriate hourly fee. This should be a routine matter. As also noted by the Third Circuit (App. A, at 35a-36a), petitioner had an

obligation and an opportunity to correct any election irregularities during the internal union administrative procedures prior to the bringing of the Secretary's action. Hence, whatever "burden" has resulted is appropriately borne by the union; unions are subject to an award of fees under every other title of the LMRDA. Indeed, under most titles, they can be sued by individual union members in multiple suits and forums. The burdens of defending potential fee claims are surely greater in those cases than under Title IV, since any claims by an intervenor such as respondent must be made within the context of the suit brought by the Secretary of Labor.[8]

B. A Common Benefit Award Is Permissible

The Court of Appeals held that on the undisputed facts of this case, respondent had demonstrated a basis for an award of fees under the common benefit doctrine.[9] That decision clearly is consistent with this

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[8] In addition, any potential intervenor in a Title IV action must satisfy the standards of FRCP 24 before intervention will be permitted; this again underscores the limited practical effect of the Third Circuit's decision.

[9] Respondent filed in the District Court a verified application for attorneys' fees which set forth his and his counsel's efforts before the union and as intervenor in the Secretary's suit. Since petitioner opposed the application by a motion to dismiss, the District Court was required to treat any factual allegations in this statement as true. The District Court held as a matter of law that respondent bestowed no common benefit on the membership of the union.

Petitioner's arguments, based on the statement of the dissenting judge below that no "irregularities" were committed by national union officials, have nothing to do with the attorneys' fees questions which petitioner asks this Court to review. As even petitioner admits (Petn. 12 n.1), the Court of Appeals regarded the allegations of respondent's fee application as true for purposes of re-

Court's earlier decisions in *Hall,* in *Mills,* and in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), where this Court expressly reaffirmed the availability of an award of fees under the common benefit doctrine. Nothing in the opinion below suggests, as petitioner urges, that it was applying the "private attorney general" theory of fee awards rejected in *Alyeska.* The decision below correctly identified the group that would benefit from Sadlowski's efforts—the membership of the petitioner union:

> " 'Fee shifting' is particularly appropriate because of the close match between the party assessed and the beneficiary of the litigation. Indeed, the benefited class, its contours shaped by the union's self-description and its finances based on per capita payments, fits the paradigm for 'common benefit' cases." (App. A, at 32a, quoting *Usery* v. *Local 639, supra,* 177 U.S. App. D.C. at 236, 543 F.2d at 383.)

The discrete nature of the challenges made by petitioner to the common benefit ruling illustrates the inappropriateness of review. Petitioner argues that only union members within the district where the disputed election occurred were benefited. Alternatively, petitioner argues that a "greater" benefit went to those district members, thereby somehow preventing an award based on a lesser benefit to the rest of the union members.

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solving the *legal* issue before it. Irregularities or improper actions by top union officials need not to be found to support a common benefit award. Respondent must demonstrate that through his litigation efforts he has conferred a common benefit on the union membership by vindicating union democracy. Moreover, as held by this Court in *Mills,* the fact that the litigation below was settled does not prevent the award of a fee based on the common benefit doctrine. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

The short answer to these arguments, as given by the Third Circuit, is that a benefit was conferred on all union members in light of the facts of this case.[10] Directors of the various districts of petitioner union sit on the national governing board of the union where they represent the interests of every union member. In addition, the candidate against whom respondent ran in District 31 was actively supported by the top officials in the union. Respondent was directly responsible for instituting and completing the process necessary for the Secretary of Labor's action, and, as intervenor, assisted in the development of procedures for the rerun election. The Court of Appeals' decision is thus perfectly consistent with this Court's decision in *Hall,* where the union member's efforts to overcome union-imposed restrictions on his right to speak out were held to benefit the entire union. In sum, the right of each union member to free and fair elections—guaranteed by Title IV of the LMRDA—was protected and strengthened by respondent's efforts.[11]

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[10] Petitioner seems to suggest that McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976), is inconsistent with the decision here. In *McDonald,* involving a suit to dissolve a union trusteeship under Title III of the LMRDA, the court approved an award based on a common benefit to members of a local union. *No benefit to the members of the national union was alleged;* thus, the court's comments about the appropriateness of an award based on a benefit to the national membership are distinguishable from the instant case.

[11] Both the Third Circuit here and the D.C. Circuit in *Local 639* held that the fact that only the Secretary of Labor is authorized to institute the Title IV action in federal court does not preclude an award of fees to an intervenor. As noted by the Fifth Circuit in reaching a similar result under Title III of the LMRDA, a common benefit award is appropriate "even though an individual may invoke the government's legal resources to prosecute a cause." McDonald v. Oliver, 525 F.2d 1217, 1228 (5th Cir. 1976) (footnote omitted).

The fact that a greater benefit may have been received by members of the union district (District 31) where the election occurred calls for no different result.[12] The only basis for finding a greater benefit to District 31 members is because they voted in the election at issue; but the director they elect represents the entire union membership and votes on matters affecting all of that membership. Nor does it matter that District 31 and other Steelworkers districts have no treasury from which the award can come. After all, it is the petitioner union itself which has decided how to collect and account for its dues. As recognized by the Third Circuit:

> "To hold that attorneys' fees must be recovered from a fund created by those who received the greatest benefit, rather than from a fund created by those who received a legally sufficient and significant benefit, would be tantamount to denial of that recovery. But more than that, such a holding would effectively allow unions to insulate themselves from union member attempts to prosecute Title IV violations. By creating an internal structure that comingles funds and denies their identifiability to an individual unit, unions could preclude recovery of attorneys' fees. Such action would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich*." (App. A, at 36a.)

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[12] The fact that respondent may also have received a personal benefit from his efforts—*i.e.*, his election to the district directorship in the rerun election—does not, as petitioner suggests, preclude a common benefit recovery. The LMRDA is not designed merely to protect the interests of the candidate but of the entire membership in free and democratic union elections. Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463, 475 (1968).

Petitioner's purported analogy (Petn. 37) to state elections misses the point. A union is a membership of workers controlled by one "government"—the national union—and subdivisions within them are merely set up by the national union for the administrative convenience of the national union. Such is obviously not the relationship of the several states to the Federal Government, and one doubts that the leadership of the United Steelworkers views its locals and districts as state governments in a federal system.

II. THE QUESTIONS PRESENTED HAVE BEEN RESOLVED IN A SIMILAR MANNER BY ALL FEDERAL COURTS OF APPEALS WHICH HAVE ADDRESSED THEM

As mentioned above, the decision of the D.C. Circuit in *Usery* v. *Local Union No. 639, Internatl. Broth. of Teamsters, Etc., supra,* is squarely in point with this case. Petitioner does not dispute this (Petn. 13). In *Local 639,* a district court had similarly denied fees, finding that Title IV precluded an award, and that no common benefit could be bestowed on the union by a union member responsible for bringing a complaint to the Secretary of Labor and later intervening in the Secretary's suit. The D.C. Circuit reversed that holding, and held as a matter of law, as has the Third Circuit here, that there was no statutory preclusion and that a common benefit could be demonstrated by an intervenor in the Secretary's Title IV suit.

Moreover, as recognized by the D.C. Circuit in *Local 639,* 177 U.S. App. D.C. at 235-36, 543 F.2d at 382-83, various federal courts have uniformly applied a common benefit rationale to award fees in other cases arising under the LMRDA. *See, e.g., Hall* v. *Cole,* 412 U.S. 1 (1973) (Title I); *Bakery & Confectionery*

Workers Internatl. Union v. *Ratner,* 118 U.S. App. D.C. 269, 335 F.2d 691 (1964) (Title V); *Yablonski* v. *United Mine Workers,* 151 U.S. App. D.C. 253, 466 F.2d 424 (1972), *cert. denied,* 412 U.S. 918 (1973) (Title IV pre-election suits); *McDonald* v. *Oliver,* 525 F.2d 1217 (5th Cir. 1976) (Title III).

III. ANY CONSIDERATION OF THIS CASE BY THE COURT IS PREMATURE

The District Court in this case refused to award fees in the erroneous belief that it did not have the power to do so under Title IV. The Court of Appeals has decided that fees can be awarded, and has ordered the District Court to determine the appropriate fee in light of its opinion. No fees have yet been awarded. Consideration of this case prior to the final award of fees by the District Court would be premature.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JOHN W. DOUGLAS
C. MICHAEL BUXTON
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6386

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006